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No. 91-912

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

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JOSEPH J. ULVIN, DORIS J. ANDERSON, LEO J. ANDERSON, MARJORIE L. BETTS, DONALD FEROE, WAYNE KEPLINGER and KATHERINE KOENIG,

*Petitioners,*

v.

NORTHWESTERN NATIONAL LIFE INSURANCE CO.,

*Respondent.*

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**On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit**

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## PETITIONERS' REPLY BRIEF

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## LIST OF ALL PARTIES TO PROCEEDINGS PURSUANT TO RULE 29.1

The following parties were appellants below but are not participating in this proceeding:

Lloyd J. Anderson, William D. Barabas, Marlys Allen, Cora Ann Bird, Clinton A. Carlson, Earnestine Collins, Mary B. Devine, Roger Dixon, Helen Duffy, Elaine L. Flynn, Joyce L. French, Joseph H. Gruber, Pat M. Haugen, Mary Hightower, Delores Iverson, Leonard W. Jackson, Jr., Arthur Janota, Bonnie Johnson, Ronald A. Jones, Marilyn J. King, Otistine Koontzy, Thomas E. Lafond, Karla K. Larson, David N. Lawrence, Linda M. Levin a/k/a Linda Levin Thomas, Julie Lozano, Renee M. McCarthy, Joan M. Mirovsky, Linda J. Napier, Flordeliza V. Parayno, Noreine D. Philbin, John Richard Potasnak, Cynthia Rataj, Richard Regis, Carl W. Rettenmayer, David L. Roberts, Myron George Sandefur, James Thomas Scannell, Sharon Ruth Stewart, James T. Szczech, Kamal Tandon, Sheldon L. Thorkelson, Jessica Waukazo, James Stanley Welman, Steven G. Williams, Erdine L. Wolf, as personal representative for the estate of Karl Wolf, deceased, Karen Young.

Respondent Northwestern National Life Insurance Company is the only corporation involved in this proceeding. The parent company and all not wholly-owned subsidiaries of Respondent are as follows:

Northwestern National Life Insurance Company is a wholly-owned subsidiary of the NWNL Companies, Inc., which is a publicly-traded company. There are no additional subsidiaries of the NWNL Companies, Inc. All subsidiaries of Northwestern National Life Insurance Company are wholly-owned except for SelectCare Health Network, Inc., a California corporation which is 50% owned by NWNL Benefits Corp., a wholly-owned subsidiary of Northwestern National Life Insurance Company, and 50% by Scripps Clinic in California.

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## PETITIONERS' REPLY BRIEF

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### ARGUMENT

The Petitioners have previously addressed the reasons for granting a writ of certiorari in this case and will not reiterate in full their position here. However, in its Opposition, Respondent Northwestern National Life Insurance Company ("NWNL") has mischaracterized the issue presented and the breadth of holding in *Tolliver v. Xerox Corp.*, 918 F.2d 1052 (2d Cir. 1990), *cert. denied*, —— U.S. ——, 111 S. Ct. 1641, 113 L. Ed. 2d 736 (1991)

(Respondent's Brief, p. 9), the key decision which is at odds with the Eighth Circuit's decision below.

The holding in *Tolliver* is simple:[1] individuals who had been forced to retire and who had not filed timely charges of age discrimination were allowed to rely upon a timely charge filed by a former employee who had been fired. *Id.*, at 1058. Respondent's reasoning in this case precisely matches that of the district court in *Tolliver*, is erroneous both in law and policy for the same reasons, and was rejected by the Second Circuit. *Id.*; *Tolliver v. Xerox Corp.*, No. 89-887L, slip op. at 14 (W.D.N.Y. February 14, 1990) (Reply Brief App. p. 14a). The Second Circuit's reasoning, if applied in Petitioners' case, would result in a reversal of the Eighth Circuit's decision below.

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[1] Nineteen named individual plaintiffs filed separate actions (later consolidated under the caption *Tolliver v. Xerox Corp.*) alleging discrimination on the basis of age in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.* All were former employees of Xerox Corporation. Some of the plaintiffs had been terminated through voluntary retirements; others had been terminated through involuntary reductions-in-force. All of the terminations occurred between November 1, 1981, and July 11, 1983. None of the *Tolliver* plaintiffs had individually filed a charge of unlawful discrimination with the EEOC within the 300-day peirod required by 29 U.S.C. § 626(d)(2). They were allowed to rely on a timely charge filed by a plaintiff in another case from which they had been excluded, *i.e.*, *Lusardi v. Xerox Corp.*, 118 F. Supp. 351, 379 (D.N.J. 1987). *Tolliver v. Xerox Corp.*, *supra*, 918 F.2d at 1058.

The district court in *Tolliver* ruled that the nineteen plaintiffs—some of whom accepted early retirement—were not similarly situated to Lusardi—who was fired—and so could not piggyback their charges onto his timely charge. *Tolliver v. Xerox Corp.*, No. 89-887L, slip op. at 14 (W.D.N.Y. Feb. 14, 1990) (Reply Brief App. 14a). The district court in *Lusardi* had previously reached the same result. *Lusardi v. Xerox Corp.*, *supra*, 118 F. Supp. at 379. The same plaintiffs were subsequently allowed to piggyback on that same charge by the Second Circuit when it reversed the district court. *Tolliver v. Xerox Corp.*, *supra*, 918 F.2d at 1058.

Respondent is correct only in its assertion that the Second Circuit in *Tolliver* found the single filing rule applied because the underlying charge "alleged that Xerox discriminated against persons over the age of forty (40), *in the same way, as a class.*" Respondent's Brief, p. 9 (emphasis added). That is the very same allegation made in the charge at issue here.

Additionally, NWNL's assertion that (1) the distinction between a collective action under the ADEA and a Fed. R. Civ. P. Rule 23 class action, and (2) the effect of court-approved notice, are not at issue in this case requires a further response.

With respect to the Rule 23 distinction, Petitioners' central point is that the Eighth Circuit too narrowly construed the "similarly situated" requirement because it viewed the charging party as a Rule 23 class representative. This led the court to apply what was, in effect, a standing analysis on Petitioners *vis-a-vis* the claims of the opt-ins.

An ADEA charging party is not a representative of absent class members, however. As long as he or she is in a situation similar to that of the opt-ins, the latter are entitled to participate in the litigation by filing consents. Where all assert that they were forced out of their jobs as part of a comprehensive reduction-in-force, the similarity of circumstances cannot be gainsaid. It is important that this Court disabuse employers of the notion that the standing approach to Rule 23 can be imported to ADEA cases.

Second, the effect of the court-approved notice in this case, and in ADEA cases generally, must be clarified. This Court has recognized the importance of court-approved notice in ADEA actions. Trial courts have been directed to "monitor[] preparation and distribution of the notice . . . [to] ensure that [the notice] is timely, accurate, and informative. . . . This procedure may avoid

the need to cancel consents obtained in an improper manner." *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 172 (1989).

As part of monitoring the distribution of the notice, the trial court determines who is entitled to receive the notice, *i.e.*, those persons who are similarly situated to the named plaintiffs. If this initial determination has no legal significance, courts will not be constrained from revoking invitations to employees to join in an ADEA lawsuit. Apart from its impact on individuals, the inefficiency of such a procedure is contrary to the express directive and implicit objectives of this Court's decision in *Sperling*. The inefficiency and inequities that flow from the present confusion [2] concerning the significance of an ADEA notice require a resolution of this issue by this Court.

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[2] Decisions of lower courts reflect confusion on the issue of the effect of an ADEA notice. Some have ruled that notice should not be sent to persons not similarly situated to the named plaintiffs. *See, e.g., Johnson v. American Airlines, Inc.*, 531 F. Supp. 957, 961 (N.D. Tex. 1982). Others have ruled that once a person has opted into an ADEA collective action, a trial court must exercise particular care in making determinations which effectively exclude that person from the lawsuit. *See, e.g., Woodall v. Drake Hotel, Inc.*, 913 F.2d 447, 451 (7th Cir. 1990).

It is for this reason that some have held that courts should determine who is similarly situated and thus eligible to opt into the lawsuit before notice is issued. *See, e.g., Allen v. Marshall Field & Co.*, 93 F.R.D. 438, 443 (N.D. Ill. 1982); *Johnson v. American Airlines, Inc.*, *supra*, 531 F. Supp. at 961. Other courts have ruled that such a determination should occur only when a person attempts to opt into the lawsuit. *Frank v. Capital Cities Communications, Inc.*, 509 F. Supp. 1352 (S.D.N.Y. 1981).

## CONCLUSION

For the reasons stated here and in the Petition for a Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

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January 1992

# APPENDIX

**APPENDIX**

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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Civ. 89-679L

AARON ALESZCZYK, AS EXECUTOR OF THE ESTATE OF RONALD F. ALESZCZYK, DECEASED,
*Plaintiff,*

v.

XEROX CORPORATION,
*Defendant.*

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Civ. 89-889L

JOHN BENNETT,
*Plaintiff,*

v.

XEROX CORPORATION,
*Defendant.*

---

Civ. 89-957L

WILLIAM BRANT,
*Plaintiff,*

v.

XEROX CORPORATION,
*Defendant.*

---

Civ. 89-1385L

PAUL F. BRAUN,
*Plaintiff*,

v.

XEROX CORPORATION,
*Defendant.*

---

Civ. 89-955L

JAMES CARROLL,
*Plaintiff*,

v.

XEROX CORPORATION,
*Defendant.*

---

Civ. 89-1002L

JAMES DAMMEN,
*Plaintiff*,

v.

XEROX CORPORATION,
*Defendant.*

---

Civ. 89-1003L

CHARLES DOLCIMASCOLO,
*Plaintiff*,

v.

XEROX CORPORATION,
*Defendant.*

---

Civ. 89-889L

HELEN A. FORDHAM,
*Plaintiff*,

v.

XEROX CORPORATION,
*Defendant.*

---

Civ. 89-1051L

JOSEPH GOLOSSI,
*Plaintiff*,

v.

XEROX CORPORATION,
*Defendant.*

---

Civ. 89-1156L

PAUL J. MITTAK,
*Plaintiff*,

v.

XEROX CORPORATION,
*Defendant.*

---

Civ. 89-1053L

ALFONSE OLIVERI,
*Plaintiff*,

v.

XEROX CORPORATION,
*Defendant.*

---

Civ. 89-914L

WALTER L. PIDEK,
*Plaintiff*,

v.

XEROX CORPORATION,
*Defendant.*

---

Civ. 89-1087L

ALFRED E. RIZZARI,
*Plaintiff*,

v.

XEROX CORPORATION,
*Defendant.*

---

Civ. 89-890L

DONALD SCHAEFER,
*Plaintiff*,

v.

XEROX CORPORATION,
*Defendant.*

---

Civ. 89-1052L

HAROLD SIEBERT,
*Plaintiff*,

v.

XEROX CORPORATION,
*Defendant.*

---

Civ. 89-887L

PETER N. TOLLIVER,
*Plaintiff*,

v.

XEROX CORPORATION,
*Defendant.*

---

Civ. 89-956L

LAWRENCE L. TRAVIS,
*Plaintiff*,

v.

XEROX CORPORATION,
*Defendant.*

---

Civ. 89-915L

RICHARD B. VAN MAAREN,
*Plaintiff*,

v.

XEROX CORPORATION,
*Defendant.*

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Civ. 89-888L

LEON A. WIATER,
*Plaintiff*,

v.

XEROX CORPORATION,
*Defendant.*

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# DECISION AND ORDER

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## INTRODUCTION

These cases involve allegations of discrimination on the basis of age in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.* Plaintiffs are all former employees of defendant Xerox Corporation, having been terminated from their positions by means of voluntary (VRIF) and involuntary (IRIV) reductions in force between 1981-1983. Defendant has moved to dismiss a total of 19 different suits brought individually alleging ADEA violations. Because the principal bases for defendant's motions to dismiss are the same in all cases—the failure of all plaintiffs to timely file an administrative claim with the EEOC—I have joined the cases for argument and decision of the motions. Two of the plaintiffs, the Estate of Ronald Aleszczyk (hereinafter "Aleszczyk") and Paul F. Braun, have raised separate issues not germane to the other plaintiffs and those issues will be treated here as well.

## I. FACTS

### A. General Background Concerning All Parties.

All 19 plaintiffs allege that they were terminated from Xerox between November 1, 1981 and July 11, 1983 as part of IRIF and VRIF programs at Xerox.

None of the plaintiffs filed individual lawsuits alleging age discrimination until the instant suits were commenced in the Western District of New York in 1989. None of the plaintiffs individually filed a charge of unlawful discrimination with the EEOC within the 300-day period required by the statute, 29 U.S.C. § 626(d)(2).

Fifteen of the plaintiffs eventually filed claims with the EEOC; 4 have never filed such a claim. Of the 15 who

did file, the dates of filing range from 392 days after the alleged discriminatory act (plaintiff Bennett) to 2,655 days thereafter (plaintiff Schaefer). Nine plaintiffs filed more than 2,000 days after the alleged discriminatory act.

On or about March 8, 1983, four representative plaintiffs (none of the plaintiffs here) commenced a class action against Xerox alleging age discrimination in the United States District Court for New Jersey. This action, entitled *Lusardia, et al v. Xerox Corporation* (*"Lusardi"*), was conditionally certified as a class action on or about January 31, 1984. Eventually approximately 1,312 individuals, including all 19 plaintiffs before me, filed written consents to "opt in" to the New Jersey case as class members. All 19 of these plaintiffs opted in to the *Lusardi* action during the 6-month period from November 26, 1983 to May 8, 1984.

The class was decertified 3 years alter, after extensive discovery concerning 51 sample plaintiffs, by United States District Judg Alfred J. Lechner, Jr. on November 5, 1987. *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987.

The Third Circuit declined to exercise jurisdiction over the appeal, but the Court did issue an order of mandamus directing Judge Lechner to reconsider his decertification decision. The Third Circuit determined that it was error for Judge Lechner to have relied in part on the fact that many class members had not timely filed EEOC claims in determining whether the case should be maintained as a class action. The Court held that unnamed class members could rely on the timely filing of EEOC charges by the named representative plaintiffs and that the class members would not be barred from participating in the class action because of their individual failure to file. *See Lusardi v. Lechner*, 855 F.2d 1062, 1077-78 (3rd Cir. 1988).

On remand, Judge Lechner reaffirmed his decision to decertify the class because he determined that the mem-

bers of the proposed class were not similarly situated and that therefore, a class action was inappropriate.

As part of the decertification notice, the district court advised class members that for purposes of commencing individual age discrimination claims, the statute of limitations would be tolled until December 23, 1988. This notice made no specific reference to the 300-day administrative filing requirement.

B. Plaintiff Aleszcyk

Ronald Aleszczyk was employed by defendant Xerox from 1963 until his August 1982 VRIF termination. Plaintiff was 42 years old at the time of his termination, and held the position of Senior Project Engineer—Mechanical.

On March 30, 1984, Aleszczyk filed his written consent to opt in to the *Lusardi* class action. On May 14, 1984, subsequent to his opting in to *Lusardi*, plaintiff filed an administrative charge with the EEOC alleging age discrimination in violation of ADEA. Aleszczyk filed this charge nearly two years after his termination.

Plaintiff in his second cause of action alleges that in June of 1984 Xerox unlawfully retaliated against him for joining the class action and filing with the EEOC. Essentially, plaintiff alleges that Xerox refused to rehire him on a contract basis because of his prior actions. Plaintiff timely filed a charge alleging this violation of EDEA with the EEOC on August 3, 1984.

Finally, as a third cause of action, Aleszczyk contends that Xerox terminated him in 1982 for discriminatory reasons based on his status as a disabled veteran. Although no statutory basis for this claim is cited in the complaint, plaintiff subsequently claimed in his motion papers that Xerox had violated the Rehabilitation Act of 1973, the Vietnam Era Veterans Readjustment Assistance Act of 1974 (VEVRAA) and the regulations set forth in 41 CFR § 60-250.4 *et seq.*

Plaintiff filed the complaint alleging these three claims on June 9, 1989.

C. Plaintiff Braun

In his complaint filed October 20, 1989, Braun alleges ADEA violations against defendant Xerox on the basis of facts similar to those underlying plaintiff Aleszczyk's complaint. Braun maintains that his August 15, 1982 termination from his position as a Senior Component Engineer & Technical Special—Component Engineering, as part of an "involuntary reduction in force" (IRIF) program, was discriminatorily motivated. At the time of his termination, plaintiff Braun was 50 years old.

Like Aleszczyk, Braun opted in to the *Lusardi*, action, on May 7, 1984. Unlike Aleszczyk, however, Braun never filed an administrative charge with the EEOC. Braun contends that on or about May 18, 1983, he attempted to file with the agency, but failed because the EEOC never remitted to him the appropriate materials and forms. After opting in to *Lusardi*, plaintiff again tried to file a claim, only to have the EEOC refuse to accept his claim apparently because he was a member of the class in *Lusardi*.

Braun also alleges that the decision to terminate him was based on his medical handicaps, consisting of arthritis and a blood disorder, which he contends had no adverse affect on his performance. Thus, plaintiff claims that defendant also has violated the Rehabilitation Act of 1973.

Braun's third claim is grounded in common law fraud. He points to an April 1982 statement made by Xerox to a funding company, to which plaintiff had applied for a mortgage, that the outlook for plaintiff's continued employment at Xerox was "good." Plaintiff alleges that he relied on this statement to his detriment in entering into the mortgage agreement, and was subsequently damaged by his August termination.

## II. DEFENDANT'S MOTIONS

Xerox has moved to dismiss, or in the alternative for summary judgment, in all the actions, on all claims. Plaintiffs Braun and Aleszczyk have cross moved for summary judgment.

### A. ADEA claims

Defendant's motion, at first blush, is deceptively simple. Xerox argues that none of the 19 plaintiffs involved in this action filed an administrative charge with the EEOC alleging age discrimination within 300 days of the allegedly discriminatory acts, as mandated by 29 U.S.C. § 626 (d). Section 626(d)(2) provides:

> No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the [Equal Employment Opportunity Commission]. Such a charge shall be filed . . . within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Because plaintiffs failed to comply with this statutory prerequisite to suit in federal court, maintains defendant, this court must dismiss these actions as a matter of law.

Were it not for the complicating effect of the *Lusardi* class action, this decision would fill but a page or two. The 300-day EEOC filing requirement operates as a statute of limitations, compliance with which is mandatory and rigorously enforced. *See Shockley v. Vermont State Colleges*, 793 F.2d 478, 481 (2d Cir. 1986); *Miller v. ITT*, 755 F.2d 20 (2d Cir. 1985); *Foster v. CBS Records*, 109 F.R.D. 168 (S.D.N.Y. 1986).

In class actions there is an exception to this requirement. *Lusardi* and other cases have recognized that each

member of a valid class action need not have complied with the 300-day filing requirement mandated by § 626 (d) (2) as long as the representative members of the class had timely filed a claim in full compliance with § 626. The class members can "piggyback" on the timely EEOC filing for purposes of the class action.

The issue before me then is this: should former opt-ins to a conditional, and ultimately decertified, class be permitted to "piggyback" on the timely EEOC filing of the named plaintiff for the purpose of proceeding with their subsequent individual claims? On the facts of this case, the court is compelled to answer this question in the negative.

In actions for age discrimination, the 300-day EEOC filing requirement is a rigid, strictly adhered-to statutory prerequisite to the filing of a complaint. It must be recognized that "[l]imitations provisions are as much a part of Congressional intent as the creation of the cause of action." *Foster, supra*, 109 F.R.D. at 171. Although plaintiffs argue strenuously that "fairness" requires that I accord paramount importance to Congress' intent to grant broad relief in matters of age discrimination, it would be erroneous, especially on the facts of this case, to ignore Congress' equally well-expressed intention to bar suits brought on the basis of accusations of discriminatory motive which are leveled years after the adverse employment decision has been made. *See Foster*, 109 F.R.D. at 170.

Courts historically have excused plaintiffs of their administrative filing obligations only in narrowly defined, exceptional circumstances. Most commonly, the time period has been extended where there is evidence that an employer, through some wrongful act, has caused a plaintiff's failure to file timely. The doctrines of "equitable tolling" and equitable estoppel only apply where the facts show that an employer somehow either fraudulently concealed the existence of a cause of action or

wrongfully prevented a terminated employee from exercising his rights. *See Cerbone v. ILGWU*, 768 F.2d 45, 48-49 (2d Cir. 1985); *O'Malley v. GTE Service Corp.*, 758 F.2d 818, 822 (2d Cir. 1985).[1]

Plaintiffs have made no such showing here. To the contrary, evidence in the record indicates that Xerox complied fully with its statutory and regulatory obligation to post in the workplace written notices informing employees of their rights and obligations under ADEA. *See* Affid. of John Kepnar, sworn to on October 11, 1989, at p. 7; 29 U.S.C. § 627.

Plaintiff Aleszczyk's contention that Xerox never personally counselled him or advised him of his rights under federal law in no way affects the analysis; aside from the posting obligation, "[t]here is no statutory requirement that an employer inform individual employees of their rights under the ADEA." *Seedman v. Alexander's, Inc.*, 683 F.Supp. 924, 927 (S.D.N.Y. 1987).

It cannot seriously be argued that the plaintiffs in this case in any way *relied* on the filing of the *Lusardi* case in declining to file their own charges with the EEOC within the requisite 300 days. The record reveals that 18 of the 19 plaintiffs before me opted in to that action more than, and in most cases *many* more than 300 days after the alleged discriminatory acts.[2] For example,

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[1] Regarding the statutory requirement under Title VII that a plaintiff bring a civil action within 90 days of receipt of a right-to-sue letter, the Court of Appeals has said "in the absence of a recognized equitable consideration, the court cannot extend the limitations period by even one day." *Johnson v. AL Tech Specialties Steel Corp.*, 731 F.2d 143, 146 (2d Cir. 1984), quoting *Rice v. New England College*, 676 F.2d 9, 11 (1st Cir. 1982).

[2] The parties concede that plaintiff Oliveri filed his consent to opt in to *Lussardi* within 300 days of his termination. Nevertheless, the court is compelled to dismiss his claim along with the others because in responding to defendant's motion he has failed to come forth with any proof, other than his own complaint, that he ever

plaintiff Helen Fordham apparently filed her written consent to join *Lusardi* 880 days subsequent to her termination. It strains credulity to suppose that this plaintiff deferred acting because she relied on the filing of Mr. Lusardi, of whose lawsuit she would not become aware for 2½ years after her termination.

In sum, plaintiffs have presented no reason why this court should depart from enforcing the rigid 300-day EEOC filing requirement imposed by ADEA. The doctrines of equitable tolling or estoppel do not apply on the instant facts, and plaintiffs cannot show that they relied in any way on the actions of the representative plaintiffs in the *Lusardi* class action.

Nevertheless, the anomalous result remains that, if these plaintiffs had been allowed to proceed as a class in the *Lusardi* action, the filing by the named plaintiff *would* have sufficed to fulfill the requirement for all unnamed class members. Why should the mere fact that the class was eventually decertified then summarily deprive the former opt-ins of their right to "piggyback" on the EEOC filings of others?

The answer lies in the rationale behind the EEOC filing requirement as it relates to the circumstances of a class action. Aside from serving to bar stale and tardy claims, the filing requirement operates to notify the EEOC and the defendant of the plaintiff's allegations, thus enabling the EEOC to perform its conciliatory function, which in turn is intended to reduce litigation. *See Anderson v. Montgomery Ward & Co.*, 631 F.Supp. 1546, 1548 (N.D. Ill. 1986).

Courts have long recognized that unnamed class members may "piggyback" on the filing of the named plain-

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filed an administrative charge with the EEOC. To the extent Xerox has moved for summary judgment, I find that plaintiff has failed to meet his burden of coming forth with sufficient facts to show that a genuine issue of material fact remains for trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

tiffs because all plaintiffs in a class action are similarly situated and have identical claims. *See Bean v. Crocker National Bank*, 600 F.2d 754, 759 (9th Cir. 1979); *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 494 (5th Cir. 1968) (Title VII case). In the class action context, because all plaintiffs are similarly situated, notice to the EEOC and to a defendant of one plaintiff's claim serves as notice of the claims of all. As is evident from the District Court's decision in the class action to *decertify* the class, former Xerox employees terminated via the IRIF and VRIF programs instituted in the early 1980s were not in fact similarly situated. The District Court in *Lusardi* discussed this:

> Because it appears the members of the proposed class come from different departments, groups, organizations, units and local offices, as well as different subsidiaries of Xerox, performed different jobs at different geographic locations, were the subject of different job actions concerning reductions in the Xerox workforce (including resignations, promotions, terminations for cause, etc.) which occurred at various times as a result of decisions by different supervisors made on a decentralized employee-by-employee basis, plaintiffs are not similarly situated.

*Lusardi v. Xerox Corp.*, 118 F.R.D. 351, 352 (D.N.J. 1987).

The court having found plaintiffs not to be similarly situated in New Jersey for purposes of the class action, it can be presumed that they are not so situated here, when they bring individual suits. Therefore, the rationale that allows non-filing individual litigants to ride on the coattails of those who file timely charges in class actions does not apply.

Plaintiffs argue that this rule elevates form over substance; that is, that, procedural technicalities aside, the EEOC and Xerox have received adequate notice of the

claims involved here, insofar as all the plaintiffs opted into the class action many years ago. Plaintiffs, however, ask the Court to assume too much. Not one of the plaintiffs in these actions has affirmatively shown that either Xerox or the EEOC was aware specifically of his individual claims before he filed either an EEOC charge or the instant individual complaint. As is evident from the *Lusardi* decertification opinion, discovery with respect to the class only covered a "sample group" of 51 employees; no plaintiff here has offered proof that he or she was a member of that group. While Xerox might have had these plaintiffs' name on a list, this does not necessarily amount to the notice contemplated by ADEA.

Today's result might differ if plaintiffs had opted in to the class action *before* their 300-day limitations periods had expired. In that event, I would have to decide whether their opting-in had the effect of tolling that period, and if so, for how long. But the facts are the facts. For what surely is a variety of reasons, these plaintiffs decided not to file administrative charges within 300 days of their terminations or bring individual lawsuits until after the class action terminated. On the day that these plaintiffs received notice of the opportunity to join the class action, they had each long since relinquished their rights to file charges with the EEOC and commence their own individual ADEA action in federal court. When the notice concerning the pending class action arrived in the mail, plaintiffs, with little risk and much to gain determined to "opt in" and essentially enjoy the benefits of a "free ride" in that litigation.

My decision today in no way disadvantages plaintiffs. Plaintiffs are in no worse a position than that they occupied the day before opting in to the class action. At that time, their circumstances were such that they were barred from bringing individual ADEA claims. At that time, their only remedy was to opt in to a proper ADEA class action filed by someone else. When that action ter-

minated, their rights as class members terminated as well.

B. Aleszczyk's Retaliation and Veteran's Claims

1. Retaliation

The parties do not dispute that, with respect to plaintiff Aleszczyk's claim of wrongful retaliation in June 1984, he filed a timely charge with the EEOC. Xerox makes its motion, however, on the ground that the statute of limitations regarding the time in which a plaintiff must file his civil complaint has run.

The statute of limitations with respect to ADEA claims is imposed in this instance by 29 U.S.C. § 626(e), which in turn, incorporates the provisions of §§ 255 and 259 of that title. Section 255(a) requires that action such as the one at bar be brought within two years after the cause of action accrues, or within three years in the case of willful violations. Moreover, Section 626(e)(2) of Title 29 U.S.C. provides for an additional extension of up to one year while the EEOC is attempting reconciliation.

Defendant maintains that, giving plaintiff the benefit of all doubts, he would have had four years within which to file his civil complaint. Since the alleged retaliation occurred in June of 1984, Xerox asserts that plaintiff's June 1989 complaint is time barred.

Plaintiff may not avail himself of the tolling of this limitations period allowed by the notice of decertification in the *Lusardi* action. The conditional certification of a class in that suit covered only claims accruing for a period of time before May 31, 1983. Therefore, to toll the limitations period as it relates to this claim is wholly illogical.

Plaintiff argues, however, that the Age Discrimination Claims Assistance Act of 1988, Pub. L. 100-283, 102

Stat. 78, (ADCAA) adds a 540-day "window" period, commencing April 7, 1988, during which he may file his retaliation claim. Congress passed ADCAA to redress the effects of mismanagement by the EEOC of age-based discrimination claims. *See Turgeon v. Rush-Presbyterian-St. Luke's Medical Center*, 1989 U.S. Dist. LEXIS 14856 (N.D. Ill. 1989).

ADCAA enumerates several conditions which must be met before a claimant can receive the benefit of the Act's tolling provisions.[3] The Court finds all such conditions to have been met in this case.

Defendant argues that plaintiff should not reap the benefits of the tolling provisions in ADCAA because his charge is no longer pending with the EEOC. That is, defendant asserts that since the EEOC, on June 4, 1986,

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[3] The Act provides in relevant part:

SEC. 3. EXTENSION OF STATUTE OF LIMITATIONS.

Notwithstanding section 7(e) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 626[e]), a civil action may be brought under section 7 of such Act by the Commission or an aggrieved person, during the 540-day period beginning on the date of enactment of this Act if—

(1) with respect to the alleged unlawful practice on which the claim in such civil action is based, a charge was timely filed under such Act with the Commission after December 31, 1983,

(2) the Commission did not, within the applicable period set forth in section 7(e) either—

(A) eliminate such alleged unlawful practice by informal methods of conciliation, conference, and persuasion, or

(b) notify such person, in writing, of the disposition of such charge and of the right of such person to bring a civil action on such claim,

(3) the statute of limitations applicable under such section 7(e) to such claim ran before the date of enactment of this Act, and

(4) a civil action on such claim was not brought by the Commission or such person before the running of the statute of limitations.

informed plaintiff's attorneys by letter that the agency intended to discontinue action on the plaintiff's claim due to his having filed suit, the tolling provisions do not apply by virtue of § 3(2)(b) of the Act. *See*, n.3, *supra*.

Defendant, however, misinterprets ADCAA. Section 3(2)(b) of the Act permits tolling if the Commission fails to notify a claimant of the disposition of his charge or eliminate the unlawful practice "within the applicable period set forth in section 7(e) [29 U.S.C. § 626(e)]."

Because § 626(e) makes reference to more than one time period, this language of ADCAA is somewhat unclear. Section 626(e)(1) incorporates the provision of the Portal-to-Portal Act of 1947, codified at 29 U.S.C. §§ 255 and 259, in setting forth the basic two-year statute of limitations applicable to the filing of civil complaints under ADEA. In subsection (2) of § 626(e), however, the statute provides for a tolling of the statute of limitations for the period during which the EEOC attempts conciliation, which period in no event is to exceed one year.

A reasonable reading of ADCAA would indicate that it is this latter, one-year period to which § 3(2)(b) refers. *See EEOC v. Puerto Rico Job Corps.*, 1990 WL 2427 (D.P.R. 1990). As is admitted by Xerox, the EEOC did not send a letter to plaintiff regarding disposition of his charge until 1986, nearly two years after he had filed that charge. Therefore, § 3(2)(b) of ADCAA does not bar application of the tolling provisions to plaintiff's claim. The EEOC did not, within one year of the filing of the charge, notify plaintiff of the disposition of his claim. In sum, plaintiff's claim does receive the benefit of ADCAA's tolling provisions, and, since the complaint was filed within the 540-day "window" period, defendant's motion to dismiss on statute of limitations grounds is denied.

2. Veteran Status

Aleszczyk also alleges that Xerox terminated him unlawfully on the basis of his status as a disabled veteran, in violation of VEVRAA, 38 U.S.C. § 2012, and the regulations promulgated thereunder, 41 C.F.R. 60-250.4 *et seq.* Plaintiff apparently suffers from tinnitus, a hearing disorder.

No court yet has held that a private right of action exists under VEVRAA. In fact, courts have held that individuals possess no such right, and that only the Department of Labor may sue under the statute. *See Barron v. Nightingale Roofing, Inc.*, 842 F.2d 20 (1st Cir. 1988); *De Leon Cruz v. Loubriel*, 539 F.Supp. 250 (D.P.R. 1982). The court in *Barron* observed that to allow a private right of action might well frustrate the orderly enforcement process set up by the regulations, which detail a specific sequence of procedures to be followed by the Department of Labor in handling veterans' complaints.

Moreover, those courts that have equivocated on the issue of the existence of a private right of action have found that complainants must first file a complaint with the Department of Labor before bringing suit. 41 C.F.R. 60-2250.26(a) provides, in relevant part that "[a]ny applicant for employment . . . or any employee . . . may . . . file a written complaint with the Veterans' Employment Service of the Department of Labor . . . alleging a violation of the Act or the regulations. . . . Such complaint is to be filed not later than 180 days from the date of the alleged violation." Plaintiff has filed no such complaint.

Although the word "may" suggests that administrative filing is permissive, courts construing this language have found exhaustion of administrative remedies to be a mandatory prerequisite to suit. *See De Leon Cruz*, 539 F.Supp. at 251; *Marin v. New York State Department of Labor*, 512 F.Supp. 353 (S.D.N.Y. 1981).

Therefore, because plaintiff cannot show that a private right of action exists, and because he has not filed a complaint with the Department of Labor, I find this cause of action to be without merit as a matter of law.

C. Braun's ADEA and Rehabilitation Act Claims

1. ADEA

Plaintiff Braun, in addition to joining the other plaintiffs' argument relating to opting in to the *Lusardi* class action, maintains that he attempted timely to file a charge with the EEOC alleging age discrimination, but was frustrated in his efforts by the agency itself. In an affidavit sworn to on December 26, 1989, Braun states that on May 10, 1983, he contacted the EEOC and was promised that appropriate materials necessary for filing a charge would be sent to him. He attests that none had been sent as of the date he consented to join the class action.

Braun has presented this court with no evidence of his encounter with the EEOC other than his own affidavit. In any event, the burden is on the claimant to file a claim. This requirement is not excused by the facts here.

2. Rehabilitation Act claim

Plaintiff Braun alleges that in discriminating against him on the basis of his medical handicap, Xerox has violated the Rehabilitation Act of 1973, codified at 29 U.S.C. § 794. The Act provides in relevant part:

> No otherwise qualified individual with handicaps . . . shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any *program or activity receiving Federal financial assistance* (emphasis added).

Defendant argues, and I agree, that plaintiff has failed to allege that Xerox is a "program or activity receiving

Federal financial assistance" under the Act. Plaintiff apparently relies on Xerox' status as a recipient of various U.S. Army procurement contracts to support his contention that Xerox falls within the ambit of this section.

Federal regulations promulgated pursuant to the Act, as well as caselaw interpreting it, specifically exclude mere receipt of procurement contracts from the definition of "Federal financial assistance." 45 C.F.R. 84.3(h) defines this term to be "any grant, loan contract (*other* than a procurement contract)" making federal funds available to recipients (emphasis added). *See also Brown v. Sibley*, 650 F.2d 760, 769 (5th Cir. 1981), citing *Rogers v. Frito-Lay, Inc.*, 433 F.Supp. 200, 204 (N.D. Tex. 1977).

Even if I were to hold that mere allegations of receipt of procurement contracts bring Xerox within the proscriptions of the Act, the Fifth Circuit in the oft-cited *Brown* decision held that a plaintiff must always allege more than that the overall entity discriminating against him receives federal financial assistance. The court wrote:

> it is not sufficient, for purposes of bringing a discrimination claim under section [794], simply to show that some aspect of the relevant overall entity or enterprise receives or has received some sort of input from the federal fisc. A private plaintiff in a section [794] case must show that the program or activity with which he or she was involved, or from which he or she was excluded, itself received or was directly benefited by federal financial assistance.

650 F.2d at 759.

Plaintiff's allegations with respect to Xerox rise nowhere near the level of specificity required by the regulations and cases. Therefore, defendant's motion to dismiss this claim is granted.

D. State Law Claim

Having dismissed the federal claims for relief brought by plaintiff Braun, I decline to exercise pendent jurisdiction over state law claims.

## CONCLUSION

For the reasons stated above, defendant Xerox' motion to dismiss plaintiffs' claims is GRANTED in its entirety as to all plaintiffs in these actions except that with respect to plaintiff Aleszczyk's retaliation claim, such motion is DENIED. Plaintiff Braun's and Aleszczyk's cross motions for summary judgment are DENIED.

IT IS SO ORDERED.

/s/ David G. Larimer
DAVID G. LARIMER
United States District Judge

Dated: Rochester, New York
February 14, 1990